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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1288

AMERICAN OIL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

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No. .....

AMERICAN OIL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

American Oil Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 8, 1967, in No. 15,924, National Labor Relations Board v. American Oil Company, 387 F2d 786 (Appendix A, infra, pages A-1 - A-6).

Opinion Below

The decision and direction of election of the Board in the representation proceeding is reported at 154 N.L.R.B. 393 and is printed as Appendix D, infra, pages A-10 - A-33. The Board's order denying the Company's Petition for Reconsideration is printed as Appendix E, infra, pages A-34 - A-35. The supplemental decision and certification of representatives in that proceeding is unreported and is printed as Appendix F, infra, pages A-36 - A-46. The Board's

decision and order in the unfair labor practice case is reported at 160 N.L.R.B. No. 46 and is printed as Appendix G, infra, pages A-47 - A-62. The opinion of the Court of Appeals enforcing the Board's order printed as Appendix A, infra, pages A-1 - A-6 is reported at 387 F2d 786.

Jurisdiction

The decree of the Court of Appeals was entered on November 8, 1967. (Appendix B hereto, infra, pages A-7 - A-8). Rehearing was denied on January 9, 1968. (Appendix C, infra, page A-9). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether process supervisors in charge of multi-million dollar refining units and the employees working on them must exercise the statutory supervisory authorities expressly delegated to them as a condition to the establishment of their supervisory status under the Act.

Statute Involved

The statutory provisions involved are sections of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq., i.e., Sec. 2(3) and (11), Sec. 7, Sec. 8(a)(5), Sec. 9(a)(d), Sec. 10(a)(b)(c) and (e). The pertinent parts of these sections are printed in Appendix H, infra, pages A-63 - A-67.

Statement

The question here presented concerning the supervisory status of process supervisors first arose in a representation proceeding in which the Board found they were not supervisors.[1] Accordingly they were included in the unit of employees in which an election was directed (Appendix D, infra, pages A-10 - A-33). Based upon the results of this election the Board certified the Union as the bargaining representative of the process supervisors and the other individuals in the unit (Appendix F, infra, pages A-36 - A-46).

The company declined to bargain with the union because of the inclusion of process supervisors in the bargaining unit in order to obtain judicial review of the question. Thereafter, in a complaint proceeding, the Board issued an order requiring the company to bargain (Appendix G, infra, page A-48). Enforce-

[1]Sec. 2(11) of the Act reads: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees of responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Sec. 2(3) reads in pertinent part: "The term 'employee' • • • shall not include • • • any individual employed as a supervisor."

An individual who meets any one of the disjunctive tests set out in Sec. 2(11) (added by the 1947 amendments) is a supervisor. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F2d 571 (6th Cir. 1948) cert. den. 335 U.S. 908, 93 L. Ed. 441, *N.L.R.B. v. Southern Airways*, 290 F2d 519 (5th Cir. 1961), *West Penn Power Company v. N.L.R.B.*, 337 F2d 993 (3rd Cir. 1964).

There is no obligation to bargain in respect to a unit that includes supervisors. *Ohio Power Co. v. N.L.R.B.*, 176 F2d 385 (6th Cir. 1949) cert. den. 338 U.S. 899, 70 S. Ct. 249, *Eastern Greyhound Lines v. N.L.R.B.*, 337 F2d 84 (6th Cir. 1964), *Warner Co. v. N.L.R.B.*, 365 F2d 435 (3rd Cir. 1966).

ment of this order was sought by the Board in the Court of Appeals. Thus the entire record in the representation and complaint proceedings was presented for review by the Court. The Court decreed enforcement. (Appendix B, pages A-7 - A-8)

The case concerns the company's Wood River (Illinois) Refinery and the staffing of its large, complex and costly units and facilities that operate continuously in the processing of crude petroleum and its derivatives and in the production of chemical additives.[2]

Each of the major units is directly in charge of a process supervisor each shift. Each process supervisor has two or more operators working under his direction (J.A. 166-168, 189-190, 244-245, 256, 263, 267, 275, 337, 402, 1205).

The process supervisors were appointed to their positions as such on September 29, 1964, at which time a bulletin was issued and published throughout the refinery outlining the authority, duties and respon-

---

[2]For example, the Fluid Catalytic Unit, representing an investment of over ten million dollars, has a daily capacity of 60,000 barrels (J.A. 214, 1205)*.

Fluidized catalyst is circulated at the rate of approximately 5,000,000 pounds per hour. The "cracking" reaction occurs at 900 to 950 degrees and the catalyst regeneration at 1150 to 1200 degrees Fahrenheit (J.A. 214-252).

The unit requires constant attention and careful control (J.A. 216-217, 219-223, 225-228, 235-239, 347, 349, 351-354, 356-364, 390-409).

There are a process supervisor and four operators on the unit each shift around the clock (J.A. 244-245, 1205).

*References thus designated are to the Joint Appendix filed in the Court of Appeals.

sibilities that had been delegated and assigned to them.[3]

There is no question about the issuance and publication of the bulletin or about the communication of its contents and related matters to the individuals involved and to all employees by the Refinery Manager.

The delegation and assignment included the following among other matters:

> "1. Responsibility to direct the work of the employees on his shift and by the use of independent judgment and discretion to determine which work shall be done and how, when and by which employees it shall be done in starting up, shutting down, operating, and controlling of the unit or facility, and in so doing to make work assignments and to issue orders and instructions to such employees in behalf of the Company with which they are required to comply."
>
> "2. To supervise, observe, inspect, and evaluate the work and conduct of the employees on his shift and to make proficiency and other reports concerning such employees and to make recommendations for increases, advancements, etc., based thereon which shall be given particular consideration and weight."
>
> "7. To administer appropriate discipline in accordance with prescribed procedures."

The process supervisors are salaried, attend meetings of supervisors and enjoy all of the privileges and

[3]This bulletin appears as an appendix to the Board's Decision and Direction of Election (Appendix D, infra, pages A-31-A-33) and is set out in large part in the opinion of the Court below (Appendix A, infra, pages A-2–A-4).

benefits of the admitted supervisors at the refinery. They are in charge of and responsible for the safe and efficient operation of their unit during their tour of duty.[4] They responsibly direct the employees in their crew in the performance of their work, make work assignments to them and see to it that they do their work as assigned and directed and the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[5] They have and exercise other supervisory authority all of which is uncontradicted. No credibility resolutions were required or made.

Prior to their advancement to process supervisors the incumbents as stillmen and on other comparable jobs had possessed and exercised supervisory authority and performed supervisory duties (J.A. 248-252, 305-306, 307-308, 345, 356-357, 427, 490, 525-526, 723-724, 779-780, 794, 802-803, 914, 920, 931, 934, 949, 950, 1005-1007, 1215-1217). They were considered by the company to be supervisors and this gave rise to the representation hearing before the Board (J.A. 127-128, 359, 385-386, 793, 803, 842, 1011, 1194, 1238-1239, 1245-1246).

The Board concluded that the delegation and assignment of supervisory authority and duties to the

[4]Over 70 references to supporting evidence in the Joint Appendix were made in the Company's brief to the Court below.

[5]Joint Appendix 167-168, 172, 176, 178, 205, 206, 207, 225, 227-228, 235-237, 242, 244, 245, 249, 256, 263, 267, 276, 299, 314, 341, 351, 352, 387, 388, 389, 396, 408, 409, 453-454, 470-471, 556-558, 679, 723, 727, 728, 731-732, 736-737, 741-745, 754, 757, 779-780, 794, 803, 834, 839, 862, 879, 914, 915, 920, 931, 934, 939, 950, 967, 969, 1005, 1006, 1007, 1042, 1043, 1045, 1051, 1075, 1076, 1084, 1113-1114, 1118, 1117, 1121, 1124-1125, 1127, 1128, 1213-1214. Also cited to the Court below.

process supervisors was more "illusory than real" because of the absence of evidence of the exercise by them of certain supervisory functions and because they are "the kind of minor supervisors that Congress did not intend to exclude from the coverage of the Act" (Appendix G, infra, pages A-10 - A-28).

The Court below found that, "* * while these supervisors have authority to release their operators from work and permit them to leave the unit during their working hours, there is no evidence of their alleged authority to discharge an employee." Continuing, the Court observed that it was "impressed by the fact that, in the parts of the record cited by respondent's counsel, there is actually not one instance of a process supervisor discharging an employee (or) exercising any of the other indicia of supervisory authority * *." The Court expressed the belief that in determining the issue "a large measure of informed discretion must be permitted to the Board." Accordingly, the Court directed that the Board's order be enforced. A concurring opinion notes that process supervisors "are only in charge of 1 to 3 operators" (Appendix A, infra, pages A-1 - A-6).

Reasons for Granting the Writ

The opinion and holding of the Court below is contrary to and in direct conflict with decisions of other Courts of Appeal on questions of far reaching importance in the administration of the Act that warrant and require review and determination by this Court.

The statutory tests for supervisors were misconstrued and misapplied by the Court below in at least

three respects. First, the Court held that the *exercise* of delegated supervisory authority is essential to qualifying as a supervisor under the Act. Secondly, it is apparent that the Court construed the statutory tests to be conjunctive instead of disjunctive. Thirdly, the Court deferred to the "informed discretion" of the Board instead of reviewing the *entire* record in accordance with the substantial evidence rule of *Universal Camera*[6] and then applying the law as written by Congress.

1. The Court and Board conceded, as the opinion and decision disclose on their face, that there was an express delegation of supervisory authority and duties to process supervisors in respect to several of the particulars ennumerated in the statutory definition. The record affords no basis for a contrary view.

After finding and setting out the delegation in its opinion the Court below said that it was "persuaded" it had no right to set aside the Board's decision that process supervisors were not supervisors within the meaning of the Act because, "in the parts of the record cited by respondent's (company) counsel, there is actually not one instance of a process supervisor discharging an employee, (or) *exercising* any of the other indicia of supervisory authority, * * *" (Appendix A, infra, page A-5, emphasis added).

This unequivocal holding that the possession of the authority specified in the Act is insufficient and that exercise of such authority must be shown in order for

[6] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456.

an individual to qualify as a supervisor is in direct conflict with decisions of other Courts of Appeals.

In *Ohio Power Company v. N.L.R.B.*, 176 F2d 385, (6th Cir. 1949) certiorari denied, 1949, 338 U.S. 899, 70 S. Ct. 249, the Court said:

> "* * the possession of any one of the authorities listed in Sec. 2(11) places the employee invested with this authority in the supervisory class" (at page 387). * * *
> "It is the existence of the power which determines the classification" (at page 388).

In *N.L.R.B. v. Leland-Gifford Co.*, 200 F2d 620, 625 (1st Cir. 1952) the Court said:

> "* * * we think the statute does mean that once an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor,' even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred. That is to say, one clothed with real power to discipline other employees, for instance, would be *ipso facto* a 'supervisor,' even though in rare cases, even years might pass before any occasion ever arose calling for an exercise of the power. And we think the same principle must apply with respect to the other powers enumerated in the section, including the power 'responsibly to direct' other employees."

In *N.L.R.B. v. Beaver Meadow Creamery*, 215 F2d 247, 251 (3rd Cir. 1954), the Court said:

> "We quite agree that Section 2(11) must be read disjunctively, that the possession of any one of

> the Section 2(11) powers will make one a supervisor, and that it is the fact of possession of the power regardless of its nonexercise that is determinative."

See also *Jas. H. Matthews & Co. v. N.L.R.B.*, 354 F2d 432 (8th Cir. 1965).

The Board itself has recognized the rule "that employees with acknowledged supervisory authority may be found to be supervisors although they have never exercised such authority" *Wasatch Oil Refinery*, 76 N.L.R.B. 417, 423 (1948). See also *Illinois Power Co.*, 155 N.L.R.B. 1097 (1965).

Excepting for the case at bar none of the Courts of Appeals has held that exercise of the authority enumerated in Section 2(11) is a condition to qualification as a supervisor within the meaning of the Act. This Court has not yet decided the question.

There is a patent conflict within the opinion below. It was there held, as has been noted, that the absence of evidence of exercise of supervisory authority was fatal to the claimed supervisory status of process supervisors. At the same time the Court found (obviously from undisputed evidence of exercise of such authority) that process supervisors had the "authority to release their operators from work and permit them to leave the unit during their working hours," that they are "in charge of 1 to 3 operators," and that employees are "under the control" of process supervisors. This clearly evidences not only the existence but the exercise of supervisory authority of the character

specified in the statutory definition, i.e., the authority responsibly to direct the work of other employees.

2. Notwithstanding the finding that process supervisors are "in charge of" and "control" employees and have the authority to release them from work and permit them to leave the unit, the Court below did not recognize or give effect to the existence and exercise of such supervisory authority. Instead, in reaching its decision that process supervisors are not supervisors the Court turned to the fact that "there is actually not one instance of a process supervisor discharging an employee." The absence of evidence of the exercise of the power to discharge seems clearly to have persuaded the Court that the process supervisors did not have the requisite authority to qualify as supervisors. It also appears clear that the Court did not construe or apply the statutory tests disjunctively, but conjunctively by holding in effect that being "in charge of" and having "control" over employees was not sufficient unless conjoined with the exercise of the power to discharge.

Neither the power to discharge nor the exercise thereof is necessary to supervisory status under the Act. The authority to discharge is but one of the areas or indicia of authority embraced in the statutory definition. It is well established that the statutory tests are to be applied disjunctively so that an individual who is possessed of any one of the indicia of supervisory authority enumerated in Section 2(11) is a supervisor within the meaning of the Act. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F2d 571 (6th Cir. 1948) cert. den. 335 U.S. 908, 69 S. Ct. 411; *Ohio Power Co. v.*

N.L.R.B., 176 F2d 385, 387 (6th Cir. 1949); *Warner Company v. N.L.R.B.*, 365 F2d 435, 437 (3rd Cir. 1966); *West Penn Power Co. v. N.L.R.B.*, 337 F2d 993, 996 (3rd Cir. 1964). The contrary decision of the Court below does not accord with any decision of this Court or of any Court of Appeals and is in direct contravention of the Act.

3. The Court below apparently confused the substantial evidence test on review with the weight to be given to the informed discretion of the Board.

The Court's opinion states "that in reaching its determination of this issue (supervisory status of process supervisors) a large measure of informed discretion must be permitted to the Board" (Appendix A, page A-5).

The issue neither calls for nor permits the exercise of discretion on the part of the Board in giving effect to the provisions of Section 2(11) of the statute as laid down by Congress. Congress expressly excluded supervisors from the coverage of the Act, and the Board may not include them. It is not a matter for administrative expertise as is the devising of remedies to effectuate the purposes of the Act. The statutory definition of supervisors is explicit. If an individual is shown to possess the authority specified, he is a supervisor as a matter of law. Whether he is possessed of such authority is a question of fact. Informed discretion and administrative expertise will not suffice as substitutes for substantial evidence on the record considered as a whole.

It appears from its opinion that the Court below did not review the entire record as required by *Universal Camera*, but instead abdicated its review function in favor of the Board's informed discretion. It thereby, in effect, approved the Board's unsupported conclusion that process supervisors are "the kind of minor supervisors that Congress did not intend to exclude from the coverage of the Act" (Appendix D, pages A-27 - A-28).

This decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Ohio Power Company v. N.L.R.B.*, 176 F2d 385, 387-388 (1949) in which it was held that the wording of Section 2(11) of the Act is plain and unambiguous, that it cannot be varied, and that it was error not to enforce the statute according to its terms.

Section 2(11) does not differentiate between major or minor supervisors. If the test of the statute is met, the employee is a supervisor, and the Board is wholly without authority to withhold administratively the application of the statute.

In affirming the Board's decision in the case at bar, the court relied upon the fact that process supervisors "are only in charge of 1 to 3 operators" (Appendix A, page A-5). Here again the Court erred in yielding to the Board's attempt to add a "ratio" test to the statutory definition. The ratio of supervisors to non-supervisory employees is not one of the statutory tests. There is no provision in the Act that authorizes or empowers the Board to fix the number of supervisors an employer may have.

The decision below is in conflict in this respect with the decisions of the Courts of Appeal for the Fifth and Sixth Circuits, respectively, in *N.L.R.B. v. Southern Airways*, 290 F2d 519 (1961) and *Ohio Power Co. v. N.L.R.B.*, 176 F2d 385 (1949). In both of these cases the supervisors were in charge of only 2 employees. The Board held there as in the case at bar that they were not supervisors and that to find otherwise would result in an abnormally high ratio of supervisors to employees. *Southern Airways Company*, 124 N.L.R.B. 749, 751 (1959), *Ohio Power Company*, 80 N.L.R.B. 1334, 1339-1340 (1949). The Board was reversed in both cases in spite of the "ratio" test which it sought to engraft on the Act and upon which the Court below erroneously relied.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals Enforcing The Board's Order

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 15924 September Term, 1967
September Session, 1967

On Petition for Enforcement of an Order of the National Labor Relations Board

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National Labor Relations Board, *Petitioner*,
v.
American Oil Company, a Maryland corporation,
Respondent.

November 8, 1967

Before Schnackenberg, Castle and Fairchild, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* We are asked by the National Labor Relations Board, petitioner, to enforce its order requiring the American Oil Company, a Maryland corporation, respondent, to *inter alia* bargain collectively with the charging union, Oil, Chemical and Atomic Workers International, as the representative of the operating and maintenance employees of re-

spondent, including so-called *process supervisors.*[1]

The primary question is whether certain employees of respondent were nonsupervisory employees (and therefore subject to collective bargaining contracts), as found by the Board, or whether they were supervisors within the denition of § 2 (11) of the National Labor Relations Act, as amended, 29 U.S.C. § 152 (11), which reads:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The record shows that on September 29, 1964, J. A. Norgaard, manager of refinery of respondent, issued a bulletin entitled:

> Stillmen, Treaters, Pumpers, Engineers on No. 5 P.S., No. 2 FCU, Ultraformer, Central Pump House, Poly Plant, Alky Plant, Boiler Room, Detergent Additives Plant, Sulfurizing Plant, and Asphalt Plant.

This bulletin classified the subject employees as process supervisors, and stated: "They have and shall have and exercise the following authority, duties, and responsibilities:

"1. Responsibility to direct the work of the em-

[1]The Board's decision and order are reported in 160 NLRB 46.

ployees on his shift and by the use of independent judgment and discretion to determine which work shall be done and how, when and by which employees it shall be done in starting up, shutting down, operating, and controlling of the unit or facility and in so doing to make work assignments and to issue orders and instructions to such employees in behalf of the Company with which they are required to comply.

"2. To supervise, observe, inspect, and evaluate the work and conduct of the employees on his shift and to make proficiency and other reports concerning such employees and to make recommendations for increases, advancements, etc., based thereon which shall be given particular consideration and weight.

"3. To recommend effectively which employees shall work on his shift.

"4. To have immediate and direct charge of the unit or facility to which assigned in respect to access thereto by the employees on his shift and all other employees.

"5. To grant permission to employees on his shift to leave or absent themselves from the unit or facility and from their usual or regularly assigned areas or places of work.

"6. To entertain and adjust grievances and complaints of the employees on his shift which arise during such shift and which concern working conditions and relations with other employees and with the Company and otherwise to provide for and to maintain the orderly, harmonious, and efficient working together of such employees in the accomplishment of the work to be done.

"7. To administer appropriate discipline in accordance with prescribed procedures."

Norgaard went on to state in the bulletin:

"This bulletin is published for the purpose of clarifying and establishing the position and supervisory status of the subject employees *who* in addition to the foregoing *shall continue to have and exercise the authority, duties, and responsibilities heretofore established.*" (Italics supplied.)

He gave each process supervisor a copy of that bulletin and a letter regarding his duties, saying, *inter alia*, that this "[your position] has necessitated your direction and control of the other employees on your shift."

The next day a copy of the bulletin was sent all employees with an accompanying letter stating therein, *inter alia*, "in order to clarify for all employees the action we have taken."

Contemporaneously, Norgaard held meetings in which he explained to the process supervisors and other supervisors their duties and responsibilities. He explained the benefits which would follow their classification and stated that other meetings would be held.

Considerable evidence was received indicating the advantages accruing to the supervisors in the way of salary, working conditions and personnel relationships with the business of respondent.

Our consideration of these facts, however, leaves little question that, while these supervisors have au-

thority to release their operators from work and permit them to leave the unit during their working hours, there is no evidence of their alleged authority to discharge an employee. We are impressed by the fact that, in the parts of the record cited by respondent's counsel, there is actually not one instance of a process supervisor discharging an employee, exercising any of the other indicia of supervisory authority, or indicating that in actual practice any of these employees was regarded as having authority to do so. We are therefore persuaded that we have no right to set aside the Board's decision that the process supervisors were not supervisors within the meaning of the act.

We believe that in reaching its determination of this issue, a large measure of informed discretion must be permitted to the Board. *N.L.R.B. v. Elliott-Williams Co.*, 7 Cir., 345 F.2d 460, 463 (1965).

Certainly in determining the legal status of employees, a question of fact is involved. Thus on this primary question of fact, we are required by the record before us to sustain the Board's order. We do so and direct that it be enforced.

Order Sustained and Enforced.

Fairchild, *Circuit Judge (concurring)*. In affirming the board's decision that the so-called process supervisors are not supervisors within the meaning of section 2(11), the fact that they are only in charge of 1 to 3 operators has some significance, along with other facts mentioned in the opinion by Judge Schnackenberg. Further, some operators are not under the con-

trol of process supervisors and some process supervisors do not always have operators working under them. Had the board found for the company there would be 47 "supervisors" for 105-115 employees. It appears that the work actually performed by the men involved did not change substantially at the time of the September 29 bulletin.

The board could well deem these men, though called "process supervisors", not part of management.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Decree of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15,924

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN OIL COMPANY, a Maryland corporation, *Respondent*.

DECREE

Before: Schnackenberg, Castle and Fairchild, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, American Oil Company, a Maryland corporation, its officers, agents, successors, and assigns on August 16, 1966. The Court heard argument of respective counsel on September 20, 1967, and has considered the briefs and transcript of record filed in this cause. On November 8, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered,

adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, American Oil Company, a Maryland corporation its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ ELMER J. SCHNACKENBERG
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ LATHAM CASTLE
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ THOMAS E. FAIRCHILD
Judge, United States Court of
Appeals for the Seventh Circuit

A True Copy:
Teste:
KENNETH J. CARRICK

Clerk of the United States Court of
Appeals for the Seventh Circuit.

APPENDIX C

Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

TUESDAY, JANUARY 9, 1968

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

Petition for enforcement of an order from the National Labor Relations Board

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No. 15924

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

AMERICAN OIL COMPANY, *Respondent*

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

Board's Decision and Certifiication

154 NLRB No. 27. D-8239
Wood River, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 14-RC-4888 and 14-RC-4889

AMERICAN OIL COMPANY, *Employer*
and
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

DECISION AND DIRECTION OF ELECTIONS

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Herbert S. Davidoff, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Thereafter, the Employer and the Petitioner filed briefs.

Upon the entire record in this case, including the briefs filed herein, the National Labor Relations Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.[1]

3. Questions affecting commerce exist concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Employer operates an oil refinery at Wood River, Illinois. The Petitioner seeks to represent the employees of this refinery in two separate units: one comprised of operating and maintenance employees, and the other of office and clerical employees. The parties agree that the proposed office and clerical unit, which corresponds with a unit previously found ap-

[1] In Case No. 14-RC-4888 the following Unions were permitted to intervene as Joint Intervenors: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 553, AFL-CIO; Sheet Metal Workers International Association, Local 268, AFL-CIO; International Hod Carriers, Building and Common Laborers Union of America, Local 338, AFL-CIO; Brotherhood of Painters, Decorators and Paperhangers of America, Local 917, AFL-CIO: Bricklayers, Masons and Plasterers International Union of America, Local 8, AFL-CIO; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, AFL-CIO; International Union of Operating Engineers, Local 525, AFL-CIO; International Association of Heat and Frost Insulators and Asbestos Workers, Local 56, AFL-CIO; International Brotherhood of Electrical Workers, Local 649, AFL-CIO; United Brotherhood of Carpenters and Joiners, Carpenters District Council of Madison County and Vicinity, Illinois, AFL-CIO; International Association of Machinists, District No. 9, AFL-CIO; and International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, Local 525.

Independent Oil Workers Union also intervened in Case No. 14-RC-4888 and in Case No. 14-RC-4889. It later withdrew from participation in Case No. 14-RC-4889.

Independent Oil Workers Union, Local No. 15, intervened in Case No. 14-RC-4889.

Independent Oil Workers Union, Local 115, intervened in both cases but later withdrew from the proceeding.

propriate by the Board, is appropriate.[2] The parties also agree that operating and maintenance employees constitute an appropriate unit. They disagree, however,—and this is the sole issue—as to whether "process supervisors" who, prior to their reclassification on September 29, 1964, had the job titles of stillman, pumper, engineer, and treater, are supervisors within the meaning of Section 2(11) of the Act.[3] The Employer contends that they are, and the Petitioner and the Intervenors that they are not.

Bargaining History

For several years before 1951, the Employer bargained with Local 115, Central States Petroleum Union, for operating and maintenance employees, excluding supervisors. In 1959, Local 115 became an affiliate of Independent Oil Workers Union but continued to represent the same employees. The most recent collective-bargaining contract covering operating and maintenance employees was effective from December 1960 to December 1963, when it was terminated by Local 115.

During the entire bargaining history, stillmen, pumpers, engineers, and treaters, the individuals who the Employer contends have now become supervisors under the job title of "process supervisors," were con-

[2] *Standard Oil Company (Indiana)*, 98 NLRB 282.

[3] Section 2(11) of the Act reads: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

sidered part of the bargaining unit as nonsupervisory employees and were covered by the terms of the various collective-bargaining contracts negotiated by Local 115 and the Employer.

The changeover to process supervisor

The Petitioner filed its petition seeking to represent operating and maintenance employees on July 1, 1964. On September 15, 1964, the Regional Director notified the parties that a hearing on the petition would be held on October 6, 1964. Two weeks after the notification of hearing, on September 29, 1964, the Employer distributed a bulletin to the individuals involved and to employees generally "for the purpose of clarifying and establishing the position and supervisory status" of stillmen, pumpers, engineers, and treaters on certain of its units. The bulletin, as set out in Appendix A, announced that the incumbents in the foregoing positions were reclassified as "process supervisors" and described their "authority, duties and responsibilities," as including the authority responsibly to direct the work of employees on their shifts, effectively to recommend changes in their status, adjust their grievances, and discipline them. According to the Employer's brief, "there is no need to go beyond the bulletin of September 29, 1964, and the related matters in determining the supervisory status of the Process Supervisors.": the bulletin was drawn "with the statutory definition [of supervisor] in mind."

Discussion

Whether an individual is a supervisor within the Act's definition cannot be determined simply by refer-

ring to the job title or by examining a theoretical expression of his responsibilities and duties in a bulletin.[4] As the Court stated in the *Southern Bleachery* case:[5]

> . . . the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or leadman who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management.

And the fact that the conferring of alleged supervisory authority on individuals who had theretofore been considered nonsupervisory followed shortly after the filing of a representation petition and represented an apparent attempt to remove them from the bargaining unit is reason for scrutinizing carefully all the surrounding factors in determining whether the authority conferred was real or only theoretical.[6]

The Plant Organization: The refinery is organized into seven divisions, of which three are staff and four are operating and maintenance. The latter are: (1) Light Oils Division, (2) Chemicals and Heavy Products Division, (3) Utilities Division, and (4) Me-

[4] *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F. 2d 235, 239 (C.A. 4), cert. denied 359 U.S. 911; *Cinch Manufacturing Corporation*, 98 NLRB 781, 783.

[5] *N.L.R.B. v. Southern Bleachery & Print Works, Inc., supra.*

[6] *American Finishings Company*, 86 NLRB 412, 417; *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (C.A. 5).

chanical Division. Process supervisors work only in the Light Oils, Chemicals and Heavy Products, and Utilities Divisions. Accordingly, we are concerned only with these three divisions. Each of the three divisions has a number of departments and subdepartments. The organization of the three divisions is as follows:

The Light Oils Division has three departments —Crude-Cracking, Finishing, and Loading.

The Crude-Cracking Department includes the No. 5 pipe still, the fluid catalytic cracking unit (referred to as No. 2 FCU or the cat cracker), and the ultraformer.

The Finishing Department includes the central pump house,[7] the butane polymerization plant No. 2 (referred to as the poly plant), the sulfuric acid alkylation plant (referred to as the alky plant), and No. 2 vapor recovery unit.

The Loading Department covers barge and tank loading.

A superintendent is in charge of the Division. Each of the three departments in the Division is headed by a general foreman and three or four shift foremen. Each of the several units in the departments is headed by an assistant general foremen.[8] There is also an additional foreman in charge of the truck rack at the pump house.

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[7]The pump house includes the continuous heater oil sweetening plant and the continuous LCGO caustic washing plant.

[8]The alkylation plant and No. 2 vapor recovery unit are headed by the same assistant general foreman.

There are 28 process supervisors in the Light Oils Division evenly divided between the Crude-Cracking and the Finishing Departments. A process supervisor on each shift generally works in a unit with two or three other employees.

The Chemicals and Heavy Products Division is divided into two departments—Chemicals Manufacturing or Additive Department, and Asphalts or Heavy Products Department.

The Chemicals Manufacturing Department units include the detergent additives plant, sulfurizing plant sulfurized dipentene plant, synthetic lubricant or syntholube plant, and the BOT plant.[9]

The Heavy Products Department units include the asphalt plant, asphalt packaging plant, compound house, and barrel house.

A superintendent is in charge of the Division. Each department is headed by a general foreman and two assistant foremen. In addition, the asphalt packaging unit and barrel house unit each has a foreman in charge. There are also four shift foremen who perform supervisory duties in the two departments comprising the Division.

There are 13 process supervisors in the Division, of whom nine are in the Chemicals Department and four in the Heavy Products Department. The process supervisor generally works with two or three other employees on each shift.

[9] BOT is an abbreviation for bisdioctyldithiadiazole.

The Utilities Division includes a boiler room, turbine room, water treating plant, and air compressors.

The Division is supervised by a superintendent, two general foremen, and four shift foremen.

There are four process supervisors. They work in the boiler room with from three to four operators and one tube blower.

The duties of the process supervisors and their assistants: The specific duties of the different process supervisors on each of the departmental subdivisions are set out in the record more in conclusory than in descriptive language. The record shows, however, and the parties do not disagree, that the process supervisors' relationship and authority with respect to the operators on the various units is substantially alike. We describe, as representative, the duties of employees at the cat cracker which is in the Light Oils Division. Employees in this unit maintain air flow from the blower, maintain valve control on gases leaving the generator, control levels of catalysts, maintain temperatures and pressures in the vessels, and watch the rate of flow of "gas oil" entering the reactor. This work involves the observation of the blower and other equipment, as well as reading and adjustment of indicators and instruments on a control board in a control room. The work, including that of the process supervisor, normally requires moving about the unit, observation and reading of gauges and equipment, turning valves and switches, recordkeeping, and cleaning the unit. The employees' equipment includes such tools as wrenches, flashlights, and screwdrivers. Their

clothing includes goggles, respirators, hard hats, protective clothing, and gloves.

The process supervisor works directly in the unit and also spends much of his time in the control room or in the immediate area. He may tell an operator to make changes to insure reactor temperatures, but the operator or boardman on the unit may himself make any necessary adjustments. Routine changes are normally made by operators without consultation with the process supervisor. Routine testing and sampling is performed by the unit operators or by laboratory employees, and maintenance work is performed by employees in the separate Mechanical Division. The process supervisor may order repairs, oversee safety aspects of the work, and direct operators to check that the equipment is repaired satisfactorily.

Progression and Wage Rates: The stillman, treater, pumper, and engineer classifications required several years of training to attain. The progression was from operator (first year), to operator (second year), to operator, and then to treater, pumper, stillman or engineer. This last job was the highest paid nonsupervisory job covered by the 1960 collective-bargaining contract. The wage was $3.625—equivalent to that of the carpenter patternmaker. There was a 35½ cent difference between it and the next lower classified job. Thereafter, in April 1962, the Employer granted a 3 percent wage increase to everyone—including the disputed group. Thus, the process supervisors' hourly wage after April 1962 and before the September 1964 changeover was approximately $3.73.

In September 1964, when the stillmen were designated process supervisors, the Employer changed the process supervisors' method of payment from an hourly wage to a monthly salary. The salary was set at $750 a month and the merit system, applicable to supervisors, was made applicable to them. It permitted earnings up to about $10,000.

Process supervisor Galliher testified that he earned $8420 in 1963 on an hourly basis and that under his current monthly salary he can earn $9000. He said that the new salary, taking into account past overtime and holiday benefits as well as a wage increase granted to hourly-paid employees after the April 1962 increase, would amount to but $243 more than his 1963 annual earnings. Light Oils Division Superintendent Gifford testified that shift foremen's earnings were at least 5 percent more than those of process supervisors and could range up to 25-30 precent more than those of the process supervisors.

Supervision: As previously stated, process supervisors work in three divisions: Light Oils, Chemicals and Heavy Products, and Utilities. Each of these divisions is headed by a superintendent.[10] Included in the undisputed supervisory hierarchy beneath the division superintendent are general foremen, assistant general foremen, foremen, and shift foremen. There are 28 process supervisors in the Light Oils Division, 13 in the Chemicals and Heavy Products Division, and 4 in the Utilities Division. Each of the process super-

[10]Over the superintendents are the refinery manager and the assistant Refinery manager.

visors generally works with one to three operators; in a few instances he may work with four or five.

Before September 29, 1964, the date of reclassification, there were 19 supervisors in the Light Oils Division to 130-140 hourly-paid employees, or one supervisor to approximately seven employees. If we were to find that the former stillmen, pumpers, engineers, and treaters are now supervisors, there would be 47 supervisors to 105-115 employees in that division, or one supervisor to slightly more than two employees. The ratio of supervisors to nonsupervisors in the Chemicals and Heavy Products Division and in the Utilities Division would not be significantly different.

Alleged Supervisory Authority of Process Supervisors: Contrary to the Employer's contention, the record shows that the individuals in dispute do not have power effectively to recommend changes in the status of other employees and they have not adjusted grievance or disciplined employees.

The record shows that the Employer has not hired employees for several years and hiring procedures are not now defined. Thus, we do not consider persuasive testimony by Light Oils Superintendent Gifford that the process supervisor "would be consulted if any hiring were done."

There is no showing that process supervisors can transfer employees. There have been no interplant transfers. The record further shows that intraplant transfers ordinarily are not feasible because of the different kinds of experience required on the different

units. It does not appear that, even in an emergency situation, the process supervisor alone would effect a transfer; rather he would ask a superior for additional help.

There is no evidence of any occasion since September 29, 1964, for a process supervisor to suspend an employee, although Superintendent Gifford testified that the process supervisors were told by the plant manager that they had the power to discharge, discipline, and suspend employees. The only instance mentioned by Superintendent Gifford occurred before September 29 and related to the superintendent's sending a shift foreman home after a stillman observed that the shift foreman was inebriated.

The record does not support any alleged authority of the process supervisors to lay off or recall employees. There have been no recent instances of layoffs and recalls. The procedures governing them had been set out in collective-bargaining contracts and employer representatives indicated those procedures would still be followed. Testimony of General Foreman Wishlinski indicated that these procedures, based on seniority, do not allow for effective recommendations by any supervisor.

Promotion, too, is based largely on contract seniority provisions, and there is no evidence that process supervisors could effectively recommend a promotion that would depart from the contract provisions. The only testimony respecting a specific instance of a promotion was that of General Foreman Leonatti in the Utilities Division. He related an instance that

occurred before the September 29 changeover, when the boiler room engineers expressed suprise that a certain operator was not promoted after a periodic test under the progression system. Thereafter, he said, the Employer retested the operator. That the opinion of the engineers was one of the factors taken into account in the Employer's determination to retest an operator under the contract progression system cannot be said to amount to an effective recommendation for promotion where the Employer proceeded independently to retest the operator's ability.

Similarly, there has been no instance of a discharge and no evidence that the process supervisor has authority to effect a discharge. General Foreman Arkis of the Chemicals Department testified that, in the event of a discharge, the process supervisor would be "in on the decision" as would the shift foreman, but "discharge is a very serious thing and this is normally not the one person that will do this. It is a consensus of opinion involving everybody up, and sometimes including the refinery manager."

There is no evidence that any process supervisor, before or after the September 29 changeover, has played a responsible part in the reward of any employee. The Employer appears to rely on the bulletin's grant of authority to the process supervisor to evaluate the work and conduct of employees, and to make proficiency reports and recommendations for increases and advances. It is apparent from Superintendent Gifford's testimony that before September 29, process supervisors under their former job titles did not

regularly evaluate the work of their assistants.

Two process supervisors testified that they were told only a week before the hearing to fill out evaluation reports on employees with whom they had worked at some time. Neither had filled out such reports before that time. Foreman Wishlinski testified that the evaluations will be used principally for training and counselling purposes. In view of the contract progression system and contract wage schedules, we do not believe that the record supports a conclusion that the process supervisors can reward employees through the evaluations or in any other manner.

There is no evidence that any process supervisor has adjusted grievances. Although management witnesses testified that process supervisors have such authority, in the only instance of the presentation of a grievance to a process supervisor since September 29, 1964, the outcome depended on a decision by the assistant general foreman who was superior to the process supervisor. The process supervisor involved testified that he did not think that he had authority to adjust the employee's grievance as he thought it should be adjusted in view of the direction on the matter received from his superior.

In the absence of any of the other usual indicia of supervisory status, there remains for consideration only the question whether these process supervisors responsibly direct the work of other employees. The Employer contends that they do, whereas the Petitioner argues that the duties of this group are only

routine and do not require the use of independent judgment.

There is a substantial hierarchy of supervision at the plant in the daytime. And at night and on weekends, there is always a shift foreman in charge. Further, the foreman superior to the shift foreman is always on call weekends and holidays, and any foreman may be called in an emergency. The process supervisor is the highest paid worker present in a unit. But this is equally true of other units where the stillmen have not been designated process supervisors.

The decisions that the process supervisor is called upon to make respecting maintaining proper temperatures, taking additional samples, determining whether instruments are functioning properly, and varying a blend, appear to be those normally a part of a highly-skilled employee's job involving complex equipment. The method of operating the various units is prescribed in an operating manual as well as in daily orders passed on from the assistant general foreman. In an emergency situation the operator or process supervisor would usually call on the shift foreman and any other admitted supervisor who could be reached.

The shutdown, turnaround, and startup for the purpose of repairing a unit occurs infrequently, and every admitted supervisor is present at such times. Similarly, in a complete shutdown, all admitted supervisory personnel are present. A written manual sets out the startup and shutdown procedure. The

decision to shut down for cleaning or lack of feed stock is generally made by one of the foremen. In a very hazardous situation, the process supervisor or even an operator may shut down the equipment. But short of this emergency, the shift foreman or assistant general foreman would decide whether to shut down.

The process supervisor cannot himself call for assistance from another unit. Indeed, in most situations such a call would be of no avail because, as Superintended Gifford testified, "the process supervisor and his crew are trained on a particular unit. It is a highly complex thing. They know this unit and they cannot willy-nilly move to another unit. . . ." It is the shift foreman who would obtain help or replacements when needed.

Similarly, the shift foreman releases employees on duty. Although Superintendent Gifford testified that the process supervisor can release an operator from the unit if he is ill, to go to a funeral, or if the unit has too many employees, he gave no specific example of such occurrence.

The writing up of work orders for mechanical repairs by process supervisors appears to be but an administrative and routine task. It was newly-instituted after September 29. Although it may be assumed that some judgment is required to determine that repair work is needed, an operator may make this determination. The procedure for authorizing hazardous work still requires several supervisors' authorization. And shift foremen still assign priorities to repair work requested by the process supervisor.

The authorizing of repairs does not substantiate supervisory responsibility for the work of other employees on the unit.

Scheduling and assignment of work on the unit is done a week in advance by the general foreman. Employees then work steadily on that part of the unit where they have experience, although there may be some changearound to gain different experience. Any authority to assign exercised by the process supervisor to carry the operation forward appears to be no more than is customary for the more experienced and skilled member of such a highly specialized mechanical crew.

We find that the control exercised by the process supervisor over his assistants "is not the type of control contemplated in the statutory definition of a supervisor; it is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a worker with management."[11]

Conclusion

The alleged alteration in the status of process supervisors after September 29, 1964, did not result from a change in manufacturing operations or a realignment or reorganization of processing personnel. The process supervisors did the same work with the same number of assistants after that date as they had done before, when classified as stillmen, pumpers, engi-

[11] *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791, enfd. 257 F. 2d 235 (C.A. 4), cert. denied 359 U.S. 911; *United States Gypsum Company*, 116 NLRB 656, 660; *United States Gypsum Company*, 121 NLRB 370, 373.

neers, and treaters. Moreover, not all stillmen, pumpers, and engineers were reclassified as process supervisors. Some of the employees in these classifications, although performing the same work as the reclassified individuals, retained their old job titles and are concededly still nonsupervisory employees.[12] As set out above, the alleged changes in the responsibilities and authority of the process supervisors created by the bulletin of September 29, 1964, are more illusory than real. To accept the contention of the Employer that the process supervisors are supervisors would result in a marked disproportion in the ratio of supervisors to nonsupervisors.[13] Finally, for the many years until 1964 that the Employer bargained collectively for its operating and maintenance employees, it recognized that the process supervisors under their former job titles of stillman, pumper, engineer, and treater were not supervisors. For all the foregoing reasons, we find that, despite their title and the bulletin of September 29, 1964, the process supervisors do not possess and exercise actual supervisory duties and authority and therefore are not supervisors who share the power of management. At most the process supervisors are leadmen or the kind of minor supervisors that Congress did not intend to exclude from

[12]In several cases the failure to reclassify may be attributable to the fact that the stillman or engineer worked alone without assistance. But in other cases where no change was made, the stillman or engineer had one or more operator assistants. This was true, for example, in the compound house, the sulfurized dipentene plant, and the BOT plant.

[13]*Mt. Clemens Metal Products Company*, 126 NLRB 1297, 1298, enfd. as modified 287 F. 2d 790 (C.A. 6); *United States Gypsum Company*, 119 NLRB 1415, 1417-1418; *Pervel Corporation*, 119 NLRB 497, 499.

the coverage of the Act.[14] Accordingly, we shall include the process supervisors in the operating and maintenance unit.

We find that the following units, excluding from each professional employees, watchmen, guards, and supervisors as defined in the Act, are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

1. All operating and maintenance employees, including process supervisors.

2. All office and clerical employees, excluding confidential employees.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 14 shall direct and supervise the elections, subject to the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period

[14] *N.L.R.B. v. Southern Bleachery & Print Works*, 257 F. 2d 235, 239 (C.A. 4). See also *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791-792; *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F. 2d 168, 171-172 (C.A. 4); *N.L.R.B. v. North Carolina Granite Corp.*, 201 F. 2d 469 (C.A. 4); *N.L.R.B. v. Griggs Euipment, Inc.*, 307 F. 2d 275, 279 (C.. 5); *N.L.R.B. v. Quincy Steel Casting Co., Inc.*, 200 F. 2d 293, 296 (C.A. 1); *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F. 2d 567, 569 (C.A. 2); *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 344 (C.A. 9), cert. denied 349 U.S. 928.

because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible in Case No. 14-RC-4888 shall vote whether they desire to be represented for collective-bargaining purposes by (1) Oil, Chemical and Atomic Workers International Union, AFL-CIO; or by (2) Independent Oil Workers Union; or by (3) United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 553, AFL-CIO; Sheet Metal Workers International Association, Local 268, AFL-CIO; International Hod Carriers, Building and Common Laborers Union of America, Local 338, AFL-CIO Brotherhood of Painters, Decorators and Paperhangers of America, Local 917, AFL-CIO; Bricklayers, Masons and Plasterers International Union of America, Local 8, AFL-CIO; International Brotherhood of

Boilermakers, Iron Ship Builders; Blacksmiths, Forgers and Helpers, Local 483, AFL-CIO; International Union of Operating Engineers, Local 525, AFL-CIO; International Association of Heat and Frost Insulators and Asbestos Workers, Local 56, AFL-CIO; International Brotherhood of Electrical Workers, Local 649, AFL-CIO; United Brotherhood of Carpenters and Joiners, Carpenters District Council of Madison County and Vicinity, Illinois, AFL-CIO; International Association of Machinists, District No. 9, AFL-CIO; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 525, Jointly; or by (4) none.

Those eligible in Case No. 14-RC-4889 shall vote whether they desire to be represented by (1) Oil, Chemical and Atomic Workers International Union, AFL-CIO, or by (2) Independent Oil Workers Union, Local No. 15, or by (3) neither.

Dated, Washington, D. C. August 10, 1965

/s/ Frank W. McCulloch,
Chairman
/s/ John H. Fanning, Member
/s/ Gerald A. Brown, Member
/s/ Howard Jenkins, Jr., Member
/s/ Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX A

AMERICAN OIL COMPANY
Wood River Refinery P. O. Box 182
Wood River, Illinois 62095

BULLETIN
MANUFACTURING DEPARTMENT
J. A. NORGAARD, Manager
R. A. JACK, Assistant Manager

In re: Stillmen, Treaters, Pumpers, Engineers on No. 5 P.S., No. 2 FCU, Ultraformer, Central Pump House, Poly Plant, Alky Plant, Boiler Room, Detergent Additives Plant, Sulfurizing Plant, and Asphalt Plant.

The subject employees have had and have exercised many of the duties and responsibilities hereinafter set forth. The full extent of their authority has not been established or clearly stated by the Refinery Manager. In order to ensure that all employees completely understand the extent of the authority, duties and responsibilities of the subject employees, the following written delegation is being promulgated.

Effective immediately, the incumbents in the above-named positions are classified as Process Supervisors. They have and shall have and exercise the following authority, duties, and responsibilities:

1. Responsibility to direct the work of the employees on his shift and by the use of independent judgment and discretion to determine which work shall be done and how, when, and by which employees

it shall be done in starting up, shutting down, operating, and controlling of the unit or facility and in so doing to make work assignments and to issue orders and instructions to such employees in behalf of the Company with which they are required to comply.

2. To supervise, observe, inspect, and evaluate the work and conduct of the employees on his shift and to make proficiency and other reports concerning such employees and to make recommendations for increases, advancements, etc., based thereon which shall be given particular consideration and weight.

3. To recommend effectively which employees shall work on his shift.

4. To have immediate and direct charge of the unit or facility to which assigned in respect to access thereto by the employees on his shift and all other employees.

5. To grant permission to employees on his shift to leave or absent themselves from the unit or facility and from their usual or regularly assigned areas or places of work.

6. To entertain and adjust grievances and complaints of the employees on his shift which arise during such shift and which concern working conditions and relations with other employees and with the Company and otherwise to provide for and to maintain the orderly, harmonious, and efficient working together of such employees in the accom-

plishment of the work to be done.

7. To administer appropriate discipline in accordance with prescribed procedures.

This bulletin is published for the purpose of clarifying and establishing the position and supervisory status of the subject employees who in addition to the foregoing shall continue to have and exercise the authority, duties, and responsibilities heretofore established.

J. A. Norgaard

Wood River, Illinois
September 29, 1964

APPENDIX E

Board's Order Denying Petition for Reconsideration

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Cases Nos. 14-RC-4888 and 14-RC-4889

AMERICAN OIL COMPANY, *Employer*
and
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO, *Petitioner*

ORDER DENYING PETITION

On August 10, 1965, the Board issued a Decision and Direction of Elections[1] in the above-entitled proceeding, finding two separate units of the Employer's employees appropriate for purposes of collective bargaining and directing separate elections therein. In its Decision, the Board found that process supervisors are not supervisors within the meaning of the Act, and included them in the unit of operating and maintenance employees, Case No. 14-RC-4888.

Thereafter, on August 23, 1965, the Employer filed a petition for reconsideration of the Board's findings with respect to process supervisors, and requested that the election in Case No. 14-RC-4888 be stayed pending reconsideration and redetermination; that if,

[1] 154 NLRB No. 27.

after reconsideration, the Board is still of the same opinion, the record be reopened to take additional evidence and testimony concerning the exercise of supervisory authority by process supervisors.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Employer's petition be, and it hereby is, denied as it contains nothing not previously considered by the Board.

Dated, Washington, D. C., September 3, 1965

By direction of the Board:

/s/ George A. Leet
Associate Executive Secretary

APPENDIX F

Board's Supplemental Decision and Certification of Representatives

Wood River, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN OIL COMPANY, *Employer*

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

SUPPLEMENTAL DECISION AND CERTIFICATIONS OF REPRESENTATIVES

Pursuant to a Decision and Direction of Elections issued by the National Labor Relations Board August 10, 1965,[1] elections by secret ballot were conducted on September 2, 1965, under the direction and supervision of the Regional Director for Region 14 among the employees in two units. After the elections, the parties were furnished with tallies of ballots.

In Case No. 14-RC-4888, of approximately 520 eligible voters, 456 cast valid ballots, of which 279 were for Oil, Chemical and Atomic Workers International Union, AFL-CIO, 127 were for Independent Oil Workers Union, 35 were for United Association of

[1] *American Oil Company*, 154 NLRB No. 27.

Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 553, AFL-CIO, et al., and 15 were against the participating labor organizations.

In Case No. 14-RC-4889, of approximately 37 eligible voters, 32 cast valid ballots, of which 4 were for Oil, Chemical and Atomic Workers International Union, AFL-CIO, 26 were for Independent Oil Workers Union, Local No. 15, and 2 were against the participating labor organizations.

Thereafter, Independent Oil Workers Union filed objections to conduct affecting the results of the election in Case No. 14-RC-4888, and the Employer filed objections to conduct affecting the results of the elections in Cases Nos. 14-RC-4888 and 14-RC-4889.

In accordance with the Board's Rules and Regulations, the Regional Director conducted an investigation and on November 4, 1965, issued and duly served upon the parties his Report on Objections and Recommendation to Overrule and Issue Certification of Representative, in which he recommended that all the objections be overruled and that the Board issue a Certification of Representative in each case. The Employer filed timely exceptions to the report.

The Board has considered the Regional Director's Report, the exceptions thereto, and the entire record in these cases, and hereby adopts the Regional Director's findings and recommendations as amplified herein.

The Employer's Exception No. 1 requests the Board

to hold that the Employer's Objections, received late, were in fact timely filed because they were mailed in proper time to the Regional offices that had been moved without notification to the Employer's counsel.

The Regional Director "mindful of the possible confusion caused by the change of address of the Fourteenth Regional Office in the midst of these proceedings . . . considered the Employer's objections on their merits." It is obvious that the Regional Director considered the objections as having been timely filed. So do we.

In its Exception II, paragraphs 1, 4, 6, 7, and 8, the Employer objects to the conduct of the election in Case No. 14-RC-4888 in that Board agents did not permit the Employer's observers to challenge the ballots of individuals classified as process supervisors. It contends that these individuals were supervisors within the meaning of the National Labor Relations Act, as amended, and hence ineligible to vote and, further, that the participation and voting in the election of persons known to the employees to be supervisors and some of whom were known to favor the Petitioner destroyed the laboratory conditions essential to a valid election.

We find no merit in the contention that Board agents improperly refused to permit the Employer to challenge the voting eligibility of process supervisors who the Board had found in its Decision and Direction of Elections were not supervisors and were therefore eligible to vote. The Board has said that parties to an election do not have an indiscriminate right to

challenge, particularly when the issues attempted to be raised by the challenger have already been decided by the Board in its Decision and Direction of Elections.[2]

Further, as the Board had found that process supervisors were not statutory representatives of management, the Employer was not responsible for their conduct, and employees could not have been misled into believing that they were acting for or on behalf of management.[3]

Exception No. II, paragraph 2, takes issue with the Regional Director's statement in the Report on Objections that a separate eligibility list which contained the names of the 46 process supervisors was approved by the parties at a preelection conference. The Employer states that it did not approve such list or agree to the voting eligibility of the process supervisors on the list. We have assumed that the Employer, in submitting the separate list of process supervisors, did not agree to the voting eligibility of those listed. Accordingly, we find no prejudice resulting to the Employer by the statement in the Report.

In Exception II, paragraph 3, the Employer questions the Regional Director's statement in the Report on Objections that a record of the attempted challenges was made during the election. As we have

[2] *Farmers Union Creamery Association*, 122 NLRB 151, 152; *Cooper Supply Company*, 120 NLRB 1023, 1024; *Atlantic Furniture Products Co.*, 102 NLRB 1241.

[3] *Cf. Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647, enfd. 242 F. 2d 497 (C.A. 2); *Hy Plains Dressed Beef, Inc.*, 146 NLRB 1253, 1254.

found that the Board agent properly refused to entertain the challenges to the votes of process supervisors, whether the agent recorded the attempted challenges, was not prejudicial to the Employer.

In Exception No. II, paragraph 5, the Employer contends that changed facts and circumstances from December 18, 1964, to the time of the election in September 1965, establishes that the process supervisors were statutory supervisors at the time of the election.

Specifically, it alleges in paragraph 5(a) that process supervisors Feldman, Curry, Wadsworth, and Cole worked as shift foremen on the day of the election and have worked a large part of their time in that capacity. The Employer relies on the affidavits of the four named individuals, which attest that they were employed as shift foremen on election day, and on the affidavits of three General Foremen, Sisk, McCarthy, and Ullman, which recount days on which the four men worked in the absence of shift foremen.

At the original hearing, the Employer's counsel stated the Employer's position as to relief shift foremen, a position with which other counsel were in agreement. It was that the work of relief shift foremen as "irregular part-time semi-occasionally in a supervisory position or in a position of one who is a supervisor would not establish their supervisory status so as to exclude them from the unit." Superintendent Gifford's testimony was to the effect that Cole and Curry, who worked at times as relief shift foremen, normally worked as process supervisors. At the hear-

ing, the Employer did not introduce evidence showing the exact number of days, shifts, or hours the process supervisors worked as relief shift foremen. There is no contention in the affidavits that the evidence now offered as to the amount of time spent in such relief work differs from the part-time relief work performed at the time of the hearing. As the Employer has made no showing why evidence bearing on the extent of relief shift foremen's substitution could not have been offered at the hearing by the exercise of due diligence, and as there is no showing that the part-time nature of the work has changed since the hearing, we find this exception to be without merit.[4]

In Exception II, paragraph 5(b), the Employer asserts that the number of shift foremen in the Light Oils Division has been reduced since the hearing and the process supervisors' duties and responsibility have increased so that the individuals performing the increased duties at the time of election meet the statutory definition of supervisor. It relies on the affidavits of Superintendent G. L. Gifford, shift foremen W. A. Miller and Van Fulkerson, general foreman Hillis H. Sisk, assistant general foreman Frank O. Suessdorf, and process supervisors Alvin Hovenkemp or (Helmkamp), A. E. Tuttle, Floyd E. Galliher, and John Closson, Jr.

We reject the proffered evidence in G. L. Gifford's affidavit to the extent that it reaffirms testimony which he gave at the hearing. Such proffer seeks to relitigate the very issue decided on evidence previous-

[4] *Missouri Transit Company*, 116 NLRB 587, 589-590; *Schott Metal Products Company*, 128 NLRB 415.

ly considered. We will not reconsider it now. Nor will we consider that part of Gifford's affidavit which seeks to elaborate on the earlier testimony with evidence which could have been introduced at the hearing.[5]

Gifford's affidavit states that the number of shift foremen in the Light Oils Division has been reduced from eight to five, but does not show any change in process supervisors' duties as a result of the reduction. Further, the facts alleged concerning work performance review and pay increases granted to process supervisors since January 1965 are not sufficient to alter our earlier Decision.

Shift foremen Miller and Fulkerson assert that due to the reduction of shift foremen, their area of responsibility broadened in March 1965 to cover all units in the Light Oils Division and that they noticed and witnessed that the responsibility and authority of process supervisors necessarily increased. These assertions lack the specificity to prove circumstances that would alter our previous Decision.

The affidavits of foremen Sisk and Suessdorf state that in March 1965, and continuing through August 1965, shift foremen in the Crude Cracking Department of the Light Oils Division decreased from four to one but with an additional acting shift foreman serving from time to time. It appears from the two affidavits that the reduction may be temporary caused by two of the previous shift foremen receiving special

[5]See footnote 4.

assignments, and the retirement of a third. The two men then enumerate process supervisor duties but do not indicate that this represents any change in duties from the period covered by the hearing.

The affidavits of process supervisors Helmkamp and Tuttle show that they work in the Chemicals and Heavy Products Division. As the Employer's exceptions assert only changed circumstances in the Light Oils Division, we do not regard these affidavits as supporting the Employer's argument.[6]

The affidavits of process supervisors Galliher and Closson do not raise substantial and material issues. Galliher testified at the hearing respecting the duties of process supervisors. His affidavit is concerned largely with the same evidence adduced at the hearing. To the extent that it seeks to enlarge on evidence of process supervisors' duties during the same period of time covered by the hearing, we reject it. The one instance mentioned of initiating safety meetings, as occurring after the election, would not alter our conclusion.

Similarly, Closson's affidavit seeks to introduce evidence respecting the period covered by the hearing. The mention of one instance, occurring in January 1965, on conducting a training program, would not serve to change the result reached in our Decision.

Exception II, paragraph 5(c) asserts that the Regional Director erred in not considering and not mak-

[6]Moreover, we observe that Helmkamp's and Tuttle's affidavits allege no new facts or circumstance occurring since the Hearing that would warrant a departure from our conclusions in the Decision.

ing findings respecting an oral statement of J. A. Norgaard, Refinery Manager, allegedly made on December 22, 1964, to the process supervisors. The Employer offers a transcript of Norgaard's oral statement which purports to explain to the process supervisors their duties as supervisors. The preelection hearing in this case was held on 17 days, including January 6, 1965. Thereafter, the parties filed briefs and the Employer filed a Motion for Reconsideration. At the hearing, the Employer's counsel specifically asked Superintendent Gifford to relate what was said at the December 22 meetings as to the duties, responsibilities, and authority of process supervisors. Gifford gave a brief account. But at no time at the hearing or thereafter did the Employer bring to the Board's attention Norgaard's verbatim remarks of December 22, 1964. There is no showing why the Employer did not seek to introduce Norgaard's full statement at the hearing. We will not at this stage permit relitigation of the "employee" status of the process supervisors on evidence that was previously available to the Employer at the preelection hearing.[7]

We find nothing in the affidavits which would warrant reversal of the Regional Director's recommendations respecting Objections 5(a) and (b).

[7] See *Hagen Manufacturing Company, Inc.*, 100 NLRB 1321, 1322. Moreover, we observe, that Norgaard's oral statement to the process supervisors, like his written statement of September 29, 1964, on which the Employer principally relied at the representation hearing, could not serve to confer actual supervisory authority where the performance of nonsupervisory duties otherwise established the process supervisors' right to be included in the unit and to vote. *N.L.R.B. v. Southern Bleachery & Print Works, Inc.*, 257 F. 2d 235, 239 (C.A. 4), certiorari denied, 359 U.S. 911.

In its Exception No. III, directed to both cases, the Employer contends that the Regional Director erred in his recommendation to overrule its Objections nos. 4 and 5(c). It contends that employees were confused and misled by the proponents of Petitioner acting for Petitioner in the name and under the guise of defunct Local 115, formerly an affiliate of the Independent Oil Workers Union. The Regional Director concluded from his investigation that there was no merit in these objections. We agree.

As the Employer's exceptions do not raise substantial and material issues with respect to the conduct and results of the election, we shall, in accordance with the recommendation of the Regional Director, issue appropriate Certifications of Representatives.

CERTIFICATIONS OF REPRESENTATIVES

IT IS HEREBY CERTIFIED that Oil, Chemical and Atomic Workers International Union, AFL-CIO, has been selected by a majority of the employees in the unit defined in Case No. 14-RC-4888, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

IT IS HEREBY CERTIFIED that Independent Oil Workers Union, Local No. 15, has been selected by a majority of the employees in the unit defined in Case No. 14-RC-4889, and that, pursuant to Section 9(a)

of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D. C. January 28, 1966.

/s/ Frank W. McCulloch,
Chairman
/s/ John H. Fanning, Member
/s/ Gerald A. Brown, Member
/s/ Howard Jenkins, Jr., Member
/s/ Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX G

Board's Decision and Order

160 NLRB No. 46 D-9166
Wood River, Ill.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 14-CA-3886, 14-CA-3919 and 14-CA-3919-2

AMERICAN OIL COMPANY
and
LOCAL 7-776, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On May 31, 1966, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceedings, finding that Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

tional Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, American Oil Company, Wood River, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. August 16, 1966

/s/ Frank W. McCulloch,
Chairman
/s/ Howard Jenkins, Jr., Member
/s/ Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

160 NLRB No. 46

TXD-339-66
Wood River, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 14-CA-3886, 14-CA-3919 and
14-CA-3919-2

AMERICAN OIL COMPANY
and
LOCAL 7-776, OIL, CHEMICAL AND ATOMIC
WORKERS INTERNATIONAL UNION, AFL-CIO
and
THOMAS G. CROWDER, An Individual

Philip Dexter, Esq., for the General Counsel.
Donald L. Hastings, Esq., and *Sam L. Erwin, Esq.*,
of Chicago, Ill., and *Karl H. Mueller, Esq.*, of
Fort Worth, Tex., for the Respondent.

John R. Tadlock, Esq., of Denver, Colo.,
for the Charging Union.

Before: *Thomas A. Ricci*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

A hearing in the above-entitled proceeding was held on April 18, 19, and 20, 1966, at St. Louis, Missouri,

on amended complaint of the General Counsel against American Oil Company, herein called the Respondent or the Company. The issue litigated is whether the Respondent violated Section 8(a)(5) of the Act.[1] A brief was filed after the close of the hearing by the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Company

The Respondent, a Maryland corporation, has its principal office and place of business in Chicago, Illinois, is engaged, among other things, in the manufacture and nonretail sale of gasoline and other oil products, and operates in many locations, one of which is its Wood River, Illinois, refinery, the only location involved in this proceeding. In the normal course of operations the Respondent annually sells and ships from this one refinery materials valued in excess of $50,000 directly to out-of-State points. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. The labor organization involved

The evidence shows, and I find, that Oil, Chemical

[1] The hearing started as a consolidated proceeding, with a complaint in Case No. 14-CA-3541, also against the Respondent, joined with this one for a single hearing. During the hearing the General Counsel announced that a settlement had been arranged in Case No. 14-CA-3541, and moved for severance. The motion was granted, and the hearing in Case No. 14-CA-3541 was continued indefinitely pending compliance with the settlement agreement.

and Atomic Workers International Union, AFL-CIO, and its Local 7-776, are labor organizations within the meaning of the Act.

III. The unfair labor practices

The complaint in this case, alleging an illegal refusal to bargain, was issued after, and essentially rests upon, a fully litigated representation proceeding (Case No. 14-RC-4888, 4889) which terminated in the certification of the International Union on January 28, 1966, as the statutory exclusive representative of the Respondent's employees in a certain appropriate bargaining unit.[2] After certification of the Union, on January 31 the Union demanded that the Respondent recognize it and bargain; by letter dated February 2, 1966, the Respondent replied that because it deemed the Board's certification invalid "in law and in fact" it refused to bargain. The Company held firm to this adamant position at the hearing on complaint. More precisely, the Respondent contends that the certificate is invalid because the bargaining unit includes a category of employees called process supervisors, whom it argues should be excluded as supervisors within the meaning of the Act.

In Case No. 14-RC-4888, pursuant to petition duly filed, a regular hearing was held during which testimony was received for 17 hearing days, and the

[2] The bargaining unit set out in the Board's certification, and which I find is now appropriate for purposes of collective bargaining is:

> All operating and maintenance employees of the Respondent at its Wood River, Illinois, oil refinery, including process supervisors, but excluding office and clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

principal question litigated was the very one concerning the alleged supervisory status of this category of employees. In its Decision and Direction of Election, issued on August 10, 1965, the Board discussed the question and the related evidence at length, and found contrary to the Respondent's contention.[3] An election was held on September 2, 1965, where a majority of the valid votes cast was in favor of the Union. The Respondent thereafter filed objections to the election, reasserting its earlier argument respecting the process supervisors, and alleging that the results should be set aside because those employees were permitted to vote. The objections were duly investigated by the Regional Director, who on November 4 issued his Report in which he recommended that the objections be overruled. The Respondent then filed Exceptions to the Regional Director's Report, with supporting affidavits and other documents. On January 28, 1966, the Board issued a Supplemental Decision and Certification of Representatives (unpublished), overruling the objections and certifying the Union as statutory majority representative in the unit originally found appropriate and again including the process supervisors. In again considering the merits of the Respondent's fundamental position, the Board evaluated the Director's Report and the documentary material submitted by the Respondent, including factual statements assertedly reflecting changed fact and circumstances up to September of 1965. Upon analysis of the total evidence then before it, the Board reaffirmed its previous conclusion that the process supervisors are not supervi-

[3] 154 NLRB No. 27.

sors as defined in the Act and therefore appropriately included in the bargaining unit.

It is clear that the Respondent's purpose in refusing to bargain on request after issuance of the certification is to test the correctness of the Board's unit determination respecting the process supervisors by court review. In justification of his determination to relitigate the entire issue at the hearing before the Trial Examiner, counsel for the Respondent stated: ". . . representation cases are nonadversary in character and are investigatory in character. As we understand it, being nonadversary, you don't litigate in an investigation as you do in a complaint case . . . it hasn't been litigated as we see it." There was no assertion of newly discovered evidence on the main question or of changed conditions following the Board's certification.

The Respondent's offer, once again, to prove the alleged supervisory status of the disputed employees and to relitigate the entire question, was rejected by the Trial Examiner. The law is clear. In a complaint proceeding, a Respondent may not raise issues that have been considered, litigated, and decided in the representation proceeding. In the interests of finality of ajudication the Board has consistently refused to reconsider, in subsequent unfair labor practice cases alleging a refusal to bargain, questions which have been disposed of in a prior representation proceeding.[4]

The Board having certified the Union on January

[4] *Mountain State Telephone and Telegraph Co.*, 136 NLRB 1612; *Emple Knitting Mills*, 151 NLRB No. 92.

28, 1966, as the exclusive representative of the employees, the validity of the certification shortly thereafter, as a matter of law, is conclusively presumed.[5] I find that at all times material herein, and more particularly since January 28, 1966, the Union has been the representative for the purposes of collective bargaining of a majority of the employees in the appropriate unit, and, the virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in the said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Accordingly, I find that by refusing to bargain with the Union on February 1, 1966, and continuously thereafter, the Respondent has violated Section 8(a)(5) and (1) of the Act. The appropriate remedial order will require that on request the Respondent bargain with the Union, as to all the employees included in the bargaining unit, with respect to all of their conditions of employment, an obligation as broad as the full scope of the statutory duty.

There is a further paragraph in the complaint, alleging that at the end of February, the very month when the Respondent in the broadest and most unequivocal terms possible rejected all claim to recognition by the Union, it also violated Section 8(a)(5) of the Act when, without consulting the Union in advance, it changed work assignments in a very minor respect, from certain pipefitters to certain barge load-

[5] *Ray Brooks v. N.L.R.B.*, 348 U.S. 96.

ers. Whereas for a long time the work of connecting and disconnecting hoses, and of operating hoists, all in the loading of barges with refinery products, had been performed by pipefitters as an incidental and very minor aspect of their regular maintenance duties, early in March, for reasons of safety to personnel and protection of equipment, the Company assigned this work on occasion to the regular barge loaders. Both groups of employees are included in the single bargaining unit. An assertion by the General Counsel at the hearing that some of this work was also assigned to employees of a company other than the Respondent, is totally unsupported by any probative evidence.

The Respondent's indifference to any possible union interest in this matter is not denied, and obviously reflects no more than adherence to the consistent position that it was not obligated to deal with the Union at all. No doubt there were other instances, in its total continuing operations of the refinery with over 500 operating and maintenance employees, where the Company took unilateral action affecting the terms and conditions of employment of other individual workmen. The Respondent standing firm in the refusal to extend any recognition to the Union, despite the present duty imposed by the statute, it follows that any act in which a term or condition of employment was altered unilaterally was equally violative of the Act. No employees were discharged because of this matter and it was not shown any earned less in wages as a result.

I think no useful purpose would be served by re-

porting in detail here the precise instances were changes of such assignments occurred, the conversations between the pipefitters and management representatives on the subject at the time, and the Company's refusal to permit certain employees to grieve over the question as official representatives of the Union. At the close of the Government's case-in-chief, the General Counsel stated that the sole remedy sought in consequence of this particular violation of Section 8(a)(5) is that the Company be ordered to bargain with the Union about its desire to change such assignments in the future. He said "the General Counsel does not request that the Company be ordered to reinstate its prior practices . . . it is not apparent that indeed any pipefitters have suffered financial loss . . . . That is a matter, we hope, as to which the Company ultimately will bargain." When the order recommended below is enforced, the Company will bargain about changes in work assignments of this kind, as well as all others.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, inimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Accordingly, the Respondent will be ordered to bargain collectively with the Union in the unit found appropriate, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing findings of fact, and upon the record in its entirety, I make the following:

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating and maintenance employees of the Respondent at its Wood River, Illinois, oil refinery, including process supervisors, but excluding office and clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act, constute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Oil, Chemical and Atomic Workers International Union, AFL-CIO, was certified on January 28, 1966, and at all times thereafter has been the duly certified

collective-bargaining representative of Respondent's employees in the appropriate unit, within the meaning of Section 9(a) of the Act.

5. By refusing on and after February 1, 1966, to meet with the above-named labor organization for purposes of collective bargaining the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that American Oil Company, Wood River, Illinois, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protec-

tion, or to refrain from any and all such activities, except to the extent that such right to be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request bargain collectively with Oil Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive bargaining representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.[6]

(b) Post at its place of business in Wood River, Illinois, copies of the notice attached hereto marked "Appendix."[7] Copies of said notice, to be furnished by

[6] The complaint also names as a bargaining agent Local 7-776, OCAW, chartered by the International Union in November of 1965, after the election, as bargaining agent of the employees involved. Whether, in its blanket refusal to recognize the certified Union, the Respondent in this instance also violated the statute in its refusal to deal with the chartered local, is beside the true issue of the case. It is only the validity of the certificate, naming only the International as the employees' choice, that is in litigation. The Respondent will, of course, bargain with the chosen spokesmen of the certified Union.

[7] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

the Regional Director for the Fourteenth Region, shall after being signed by the Respondent's representative be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, deface, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from date of receipt of this Decision, what steps it has taken to comply herewith.[8]

/s/ Thomas A. Ricci
Trial Examiner

[8] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX

FORM NLRB-4632
(11-65)

TXD-339-66

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

We hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below:

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modi-

fied by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL bargain collectively, upon request, with the Union as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

All operating and maintenance employees of our Wood River, Illinois, oil refinery, including process supervisors, but excluding office and clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

AMERICAN OIL COMPANY
(Employer)

Dated..... By.....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1040 Boatmen's Bank Building, 314 North Broadway, St. Louis, Missouri 63102 (Tel. No. 622-4156).

APPENDIX H

Pertinent Statutory Provisions

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C., 141 et seq.) are as follows:

"TITLE I-AMENDMENT OF NATIONAL LABOR RELATIONS ACT

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:" * * * *

"DEFINITIONS

"Sec. 2. When used in this Act—" * * * *

"(3) *The term 'employee'* shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but *shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or *any individual employed as a supervisor*, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein

defined." (Emphasis Added) * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." * * *

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the etxent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"UNFAIR LABOR PRACTICES

"Sec. 8 (a) It shall be an unfair labor practice for an employer—" * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." * * * *

"REPRESENTATIVES AND ELECTIONS

"Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:"
* * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript." * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." * * * *

"(b) Whenever it is charged that any person has

engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency." * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:" * * * *

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business,

for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1288

AMERICAN OIL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1—A–6) is reported at 387 F. 2d 786. The Board's decisions (Pet. App. A–10—A–33, A–47—A–62) are reported at 154 NLRB 393, and 160 NLRB 541.

JURISDICTION

The decree of the court of appeals was entered on November 8, 1967 (Pet. App. A–7—A–8), and a petition for rehearing was denied on January 9, 1968 (Pet. App. A–9). The petition for a writ of certiorari was filed on April 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-213—68

QUESTION PRESENTED

Whether the court of appeals correctly concluded that, on the facts of this case, the Board was warranted in finding that the Company's "process supervisors" are not supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. A–63—A–64.

STATEMENT

The Board found that petitioner Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain collectively with the Oil, Chemical and Atomic Workers International Union, AFL–CIO, which had been certified by the Board as the representative of the Company's operating and maintenance employees at its oil refinery at Wood River, Illinois. The sole issue is whether the Company's refusal was justified because the designated unit included "process supervisors," who the Company contends are supervisors within the meaning of Section 2(11) of the Act and thus should have been excluded. The facts controlling the status of the "process supervisors" are as follows:

On September 29, 1964, shortly after the Board's regional director scheduled a hearing on the representation petition filed by the Union, the Company distributed a bulletin to its employees announcing that "stillmen," "treaters," "pumpers," and "engineers" were reclassified as "process supervisors," and would

have, *inter alia,* the authority responsibly to direct the work of the men under them, to make recommendations respecting promotions and raises, to entertain or adjust grievances, and to administer appropriate discipline in accordance with prescribed procedures (Pet. App. A–13, A–31—A–33). For at least the preceding 15 years of the Company's bargaining relationship with Local 115 of the Independent Oil Workers Union, it had regarded stillmen, treaters, pumpers, and engineers as non-supervisory personnel who were within the bargaining unit covering operating and maintenance employees (Pet. App. A–12—A–13; J.A. 110–111, 118, 1187–1188).[1] The Board found that, notwithstanding the alteration in job title and the formal change in status, the alleged change in responsibilities and authority was "more illusory than real" since these individuals continued to function as before and did not "possess and exercise actual supervisory duties" (Pet. App. A–26—A–27).[2]

The Company has 46 process supervisors working in the three of its divisions involved. Each of these divisions is headed by a superintendent, and below him are general foremen, assistant general foremen, and shift foremen—all of whom are admittedly supervisors under the Act. (Pet. App. A–19; J.A. 1198,

[1] "J.A." refers to the Joint Appendix in the court below, which is part of the record filed in this Court.

[2] Indeed, not all stillmen, pumpers, and engineers were reclassified as process supervisors. Some of the individuals in these classifications, although performing the same work as those who were reclassified, retained their old job titles (Pet. App. A–27; J.A. 753–754, 782–785, 756–757, 787–790, 828, 1219, 1206–1207).

1201, 363–364.) Each of the process supervisors generally works with from one to three operators; in a few instances, with four or five (Pet. App. A–19—A–20; J.A. 1205–1207, 1209).[3]

The duties of the process supervisors are illustrated by the work of the "cat cracker" unit in the Light Oils Division. Employees in this unit maintain air flow from the blower, maintain valve control on gases leaving the generator, control levels of catalysts, maintain temperatures and pressures in the vessels, and watch the rate of flow of "gas oil" entering the reactor. The work, including that of the process supervisor, normally requires moving about the unit, observing and reading gauges and equipment, turning valves and switches, keeping records, and cleaning the unit. The process supervisor works directly in the unit and also spends time in the control room, where there is a board with indicators and instruments. He may tell an operator to make changes to insure reactor temperatures, but the operator or boardman in the unit may himself make any necessary adjustments. (Pet. App. A–17—A–18.) The method of operating this and other units is detailed in an operating manual and in daily orders from the assistant general foreman (Pet. App. A–24; J.A. 373–382, 473,

[3] Before the reclassification, there were 19 men concededly of supervisory status in one of the divisions staffed by 130–140 hourly paid employees, or 1 supervisor to approximately 7 employees. If the 28 process supervisors in that division are also supervisors within the meaning of the Act, there are now 47 supervisors to 105–115 employees, or 1 "supervisor" to slightly more than 2 employees. (Pet. App. A–20; J.A. 423–424, 353–354.)

778–779, 795). Moreover, a written manual sets out in detail the procedure involved in startups and shutdowns; the decision to shut down is made by a foreman unless there is an emergency, in which case even an operator may shut down the equipment (Pet. App. A–24—A–25; J.A. 507–509, 513–514, 587–588, 673, 927–931, 938–939, 1047–1049, 1083–1088).

In rejecting the contention that process supervisors have effective power to recommend changes in the status of other employees the Board found that a process supervisor cannot effect a transfer even in an emergency situation where help outside the unit is needed; he asks a superior for additional men. (Pet. App. A–20—A–21; J.A. 292–297, 520–521, 745–746, 945–947, 963, 1069.) Process supervisors do not have authority to suspend employees (Pet. App. A–21; J.A. 304–305, 989), or to promote, reward, lay off, or recall employees (Pet. App. A–21—A–22; J.A. 306, 308–310, 457–458, 640, 810–811, 951–952, 1070–1071).[4] There have been no instances where a process supervisor has discharged an employee (Pet. App. A–22; J.A. 809, 985, 989), or adjusted a grievance (Pet. App. A–23).[5]

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[4] Procedures covering these matters are governed by the collective bargaining agreement (Pet. App. A–21; J.A. 412, 869). Moreover, General Foreman Wishlinski testified that promotion procedures, which are based on seniority, do not allow for effective recommendations by any supervisor, and that pay increases based on meritorious performance could be granted only to supervisory personnel (Pet. App. A–21; J.A. 893–894, 905–906).

[5] In the only case where a grievance was presented after the reclassification, the process supervisor involved referred the grievant to the assistant general foreman (J.A. 985–988).

Scheduling and assignment of work on the unit is done a week in advance by the general foreman (Pet. App. A–26; J.A. 592–593, 608–609, 652–654, 779–780, 851). Although process supervisors have been allowed, since the reclassification, to write up work orders for mechanical repairs, these orders are submitted either to the mechanical area or to the shift foremen, who still assign priorities to the work requested and can postpone or even reject the request (Pet. App. A–25; J.A. 325, 578–580, 615–616, 642–650, 773–775, 699–700, 820–821, 848, 973–974, 977–980).

Based on these facts and the other evidence in the record, the Board concluded that, despite their new title and the purport of the September 29, 1964, bulletin, the process supervisors did not possess sufficient authority to make them supervisors within the meaning of Section 2(11) of the Act—that they were at most "leadmen or the kind of minor supervisors that Congress did not intend to exclude from the coverage of the Act" (Pet. App. A–27—A–28). Accordingly, the Board held that the process supervisors were properly included in the operating and maintenance unit, and ordered the Company to bargain with the Union for that unit (Pet. App. A–28, A–58—A–59). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A–1—A–6).

ARGUMENT

Section 2(11) of the Act defines a "supervisor," who is excluded from the Act's coverage, as:

> any individual having authority * * * to hire, transfer, suspend, lay off, recall, promote, dis-

> charge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The question whether an individual is a "supervisor" involves the application of these criteria to the facts of each particular case, and the Board's determination, if supported by substantial evidence, is entitled to stand. Cf. *National Labor Relations Board* v. *United Insurance Co.*, Nos. 178 and 179, this Term, decided March 6, 1968. The Board has correctly applied those criteria here, and the facts summarized in the Statement (*supra*, pp. 2–6) show that there is ample evidentiary support for its conclusion, sustained by the court below, that the Company's "process supervisors" do not possess the authority and judgment required to make them supervisors within the meaning of Section 2(11) of the Act.

Contrary to the Company's contention (Pet. 8–10), the Board and the court below did not ignore the settled principles (1) that any of the powers enumerated in Section 2(11) is sufficient to make an individual a supervisor, and (2) that it is the possession of the power, and not its exercise, which is decisive. On the contrary, the Board found that process supervisors possessed *none* of the powers set forth in Section 2(11). To be sure, in making this finding, the Board took into account the fact that there was no showing that the process supervisors, either before or after

their reclassification, performed certain functions. But this inquiry was a perfectly proper consideration in the Board's assessment of the status of process supervisors. While the non-exercise of a power otherwise shown to exist may not be sufficient to negate supervisory status, the question whether a function is performed is certainly a relevant factor in determining whether power to exercise it in fact exists.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.
APRIL 1968.

[6] The cases relied on by the Company (Pet. 9–10) are distinguishable on their facts. *E.g.*, in *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385 (C.A. 6), certiorari denied, 338 U.S. 899, the court found that the control operator, with some minor exceptions, "handles the entire operation of the plant," and that "in time of emergency" he had "authority * * * to requisition any men on the spot" (pp. 387, 388). As shown *supra*, the process supervisors here did not have similar authority.

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